



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

APR - 8 2014

REPLY TO THE ATTENTION OF:

SC-5J

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Steven C. Kohl, Partner
Warner Norcross & Judd LLP
2000 Town Center, Suite 2700
Southfield, Michigan 48075-1318

Re: **Bayer CropScience, Muskegon, Michigan**
Consent Agreement and Final Order
Docket No. CAA-05-2014-0018

Dear Mr. Kohl,

Enclosed please find a fully executed Consent Agreement and Final Order (CAFO) in resolution of the above case. U.S. EPA has filed the original CAFO with the Regional Hearing Clerk on April 8, 2014. Please note Bayer CropScience's (Bayer's) obligation to pay a civil penalty in the amount of \$23,296 in the manner prescribed in paragraphs 36-41 and please reference your check with the docket number. In addition, Bayer must complete a Supplemental Environmental Project worth \$63,630 as prescribed in paragraphs 42-56.

Please feel free to contact Monika Chrzaszcz at (312) 886-0181 if you have any questions regarding the enclosed documents. Please direct any legal questions to William Wagner, Regional Counsel, at (312) 886-4684. Thank you for your assistance in resolving this matter.

Sincerely yours,

Michael E. Hans, Chief
Chemical Emergency
Preparedness & Prevention Section

Enclosure

cc. William Wagner, ORC

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5



In the Matter of:

Bayer CropScience LP
Muskegon, Michigan

Respondent.

Proceeding to Assess a Civil Penalty
Under Section 113(d) of the Clean Air
Act, 42 U.S.C. § 7413(d)

Docket No. CAA-05-2014-0018

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 113(d) of the Clean Air Act (the Act), 42 U.S.C. § 7413(d), and Sections 22.1(a)(2), 22.13(b), and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (Consolidated Rules), as codified at 40 C.F.R. Part 22, for violations of Section 112(r) of the Act, 42 U.S.C. § 7412(r), and the implementing regulations.

2. Complainant is the Director of the Superfund Division, United States Environmental Protection Agency (U.S. EPA), Region 5, Chicago, Illinois.

3. Respondent, Bayer CropScience LP (Respondent), is a limited partnership doing business in the State of Michigan.

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO). 40 C.F.R. § 22.13(b).

5. The parties agree that settling this action without the filing of a complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. In order to resolve this matter without litigation, Respondent consents to entry of this CAFO and the assessment of the specified civil penalty, and agrees to comply with the terms of the CAFO.

Jurisdiction and Waiver of Right to Hearing

7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in the CAFO.

8. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

Statutory and Regulatory Background

9. Section 112(r)(1) of the Act, 42 U.S.C. § 7412(r)(1), provides that it shall be the objective of the regulations and programs authorized under this subsection to prevent the accidental release and to minimize the consequences of any such release of any substance listed pursuant to Section 112(r)(3), or any other extremely hazardous substance.

10. Section 112(r)(3) of the Act, 42 U.S.C. § 7412(r)(3), provides that the Administrator shall promulgate, not later than 24 months after November 15, 1990, an initial list of 100 substances which, in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment.

11. Section 112(r)(7)(A) of the Act, 42 U.S.C. § 7412(r)(7)(A), provides that in order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include

monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements.

12. Section 112(r)(7)(B)(i) of the Act, 42 U.S.C. § 7412(r)(7)(B)(i), provides that within 3 years after November 15, 1990, the Administrator shall promulgate reasonable regulations and appropriate guidance to provide, to the greatest extent practicable, for the prevention and detection of accidental releases of regulated substances and for response to such releases by the owners or operators of the sources of such releases.

13. Section 112(r)(7)(B)(ii) of the Act, 42 U.S.C. § 7412(r)(7)(B)(ii), provides that the regulations under this subparagraph shall require the owner or operator of stationary sources at which a regulated substance is present in more than a threshold quantity to prepare and implement a Risk Management Plan (RMP) to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment.

14. Under Section 112(r) of the Act, 42 U.S.C. § 7412(r), the Administrator initially promulgated a list of regulated substances, with threshold quantities for applicability, at 59 Fed. Reg. 4478 (January 31, 1994), which have since been codified, as amended, at 40 C.F.R. § 68.130.

15. Under Section 112(r) of the Act, 42 U.S.C. § 7412(r), the Administrator promulgated "Accidental Release Prevention Requirements: Risk Management Programs Under Clean Air Act Section 112(r)(7)," 61 Fed. Reg. 31668 (June 20, 1996), which were codified, and amended, at 40 C.F.R. Part 68: Chemical Accident Prevention Provisions (Risk Management Program Regulations).

16. "Stationary source" is defined to mean "any buildings, structures, equipment,

installations, or substance emitting stationary activities which belong to the same industrial group, which are located on one or more contiguous properties, which are under the control of the same person (or persons under common control), and from which an accidental release may occur.” 40 C.F.R. § 68.3.

17. “Process” is defined to mean “any activity involving a regulated substance including any use, storage, manufacturing, handling, or on-site movement of such substances, or combination of these activities.” 40 C.F.R. § 68.3.

18. Under Section 112(r)(3) of the Act, 42 U.S.C. § 7412(r)(3), the Administrator has listed ammonia (CAS No. 7664-41-7) as a substance which, in the case of an accidental release, is known to cause or may reasonably be anticipated to cause death, injury, or serious adverse effects to human health or the environment. The Administrator has further identified a threshold quantity of 10,000 lbs. for ammonia (CAS No. 7664-41-7) for determining whether sources are subject to the Risk Management Program. 40 C.F.R. § 68.130, Tables 1 and 2.

19. 40 C.F.R. § 68.115 provides that a “threshold quantity of a regulated substance listed in 40 C.F.R. § 68.130 is present at a stationary source if the total quantity of the regulated substance contained in a process exceeds the threshold.”

20. 40 C.F.R. § 68.12 requires that the owner or operator of a stationary source subject to 40 C.F.R. Part 68 shall submit a single RMP, as provided in 40 C.F.R. §§68.150 through 68.185.

21. 40 C.F.R. § 68.12(d) requires that, in addition to meeting the general requirements of 40 C.F.R. § 68.12(a), the owner or operator of a stationary source with a process subject to Program 3 shall meet additional requirements identified at 40 C.F.R. § 68.12(d).

22. Section 113(d) of the Act 42 U.S.C. §7413(d) and 40 C.F.R. Part 19 provide that

the Administrator of the U.S. EPA may assess a civil penalty of up to \$32,500 per day of violation up to a total of \$270,000 for each violation of Section 112(r) of the Act that occurred from March 15, 2004 to January 12, 2009 and a civil penalty of up to \$37,500 per day of violation up to a total of \$295,000 for each violation of Section 112(r) of the Act that occurred after January 12, 2009 and before December 6, 2013.

23. Section 113(d)(1) of the Act limits the Administrator's authority to matters where the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action, except where the Administrator and the Attorney General of the United States jointly determine that a matter involving a longer period of violation is appropriate for an administrative penalty action.

Factual Allegations and Alleged Violations

24. Respondent is a "person," as defined at Section 302(e) of the Act, 42 U.S.C. § 7602(e).

25. Respondent owns and operates a fungicides, herbicides, and insecticides production facility located at 1740 Whitehall Road, Muskegon, Michigan, which consists of buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites, and which are owned or operated by the same person (Bayer CropScience Facility).

26. On November 1, 2004, under Section 112(r) of the Act, 42 U.S.C. § 7412, and implementing regulations, 40 C.F.R. Part 68, Respondent submitted to U.S. EPA an RMP for the Bayer CropScience Facility.

27. According to the RMP submitted to U.S. EPA by Respondent, the Bayer CropScience Facility:

a. fell within NAICS Code 32532, as "Pesticide and Other Agricultural Chemical";

b. used ammonia (CAS No. 7664-41-7) as a process chemical during its operations; and,

c. held at least 10,000 lbs. of ammonia (CAS No. 7664-41-7).

28. On March 16, 2010, authorized representatives of U.S. EPA conducted an inspection at the Bayer CropScience Facility to determine its compliance with 40 C.F.R. Part 68.

29. The Bayer CropScience Facility is a "stationary source," as defined at 40 C.F.R. § 68.3.

30. On November 1, 2004, having held for use in its operations at the Bayer CropScience 10,000 lbs. or more of ammonia, Respondent exceeded the applicability threshold established by 40 C.F.R. § 68.130, and became subject to 40 C.F.R. Part 68.

31. For purposes of compliance with 40 C.F.R. Part 68, Respondent has acknowledged in its RMP, that the Bayer CropScience facility was required to meet Program 3 eligibility requirements.

32. Based on the inspection conducted on March 16, 2010, and a review of additional information received by U.S. EPA subsequent to that date, U.S. EPA has identified the following alleged violations by Respondent of the Risk Management Program Regulations:

- a. Failing to document persons responsible for implementing individual requirements of the risk management program and to define the lines of authority through an organization chart or similar document, as required under 40 C.F.R. § 68.15(c).
- b. Failing to review and update the off-site consequence analyses at least once every five years, as required under 40 C.F.R. § 68.36(a);
- c. Failing to maintain certain records for the worst-case scenario: a description of the vessel or pipeline and substance selected, assumptions and parameters used, the rationale for selection, and anticipated effect of the administrative controls and passive mitigation on the release quantity and rate, as required under 40 C.F.R. § 68.39(a);
- d. Failing to maintain certain records for the alternative release scenario: a description of the scenario identified, assumptions and parameters used, the rationale for the selection

- of specific scenarios, and anticipated effect of the administrative controls and mitigation on the release quantity and rate, as required under 40 C.F.R. § 68.39(b);
- e. Failing to maintain data used to estimate population and environmental receptors potentially affected, as required under 40 C.F.R. § 68.39(e);
 - f. Failing to certify that operating procedures at the Facility were current and accurate in 2008, as required under 40 C.F.R. § 68.69(c);
 - g. Failing to provide refresher training at least every three years, or more often if necessary, to each employee involved in operating a process to assure that the employee understands and adheres to the current operating procedures of the process, as required under 40 C.F.R. § 68.71(b);
 - h. Failing to ascertain that each employee involved in operating a process at the Facility had received and understood the training required by 40 C.F.R. § 68.71, and failure to prepare a record for each employee which contained the identity of the employee, the training date, and the means Respondent used to verify that the employee understood the training, as required under 40 C.F.R. § 68.71(c);
 - i. Failing to perform inspections and testing of pressure relief valves at the Facility at a frequency consistent with the applicable manufacturers' recommendations and good engineering practices, as required under 40 C.F.R. § 68.73(d)(3);
 - j. Failing to certify that the stationary source evaluated compliance with the provisions of the prevention program at least every three years to verify that the developed procedures and practices are adequate and being followed, as required under 40 C.F.R. § 68.79(a);
 - k. Failing to review and update the Risk Management Plan and submit it to EPA within five years of its most recent update, as required under 40 C.F.R. § 68.190(b)(1); and
 - l. Failing to submit corrected emergency contact information within thirty days of a change, as required under 40 C.F.R. § 68.195(b).

33. Section 112(r)(7)(E) of the Act, 42 U.S.C. § 7412(r)(7)(E), provides that after the effective date of any regulation or requirement promulgated pursuant to Section 112(r) of the Act, it shall be unlawful for any person to operate any stationary source in violation of such regulation or requirement.

34. Accordingly, the above-described violations of 40 C.F.R. Part 68 and Section 112(r) of the Act are subject to the assessment of a civil penalty under Section 113(d) of the Act, 42 U.S.C. § 7413(d).

35. Pursuant to Section 113(d)(1) of the Act, the Administrator and the Attorney General of the United States, each through their respective delegates, jointly determined that an

administrative penalty action is appropriate for the period of violations alleged in this complaint.

Civil Penalty

36. Based on an analysis of the factors specified in Section 113(e) of the Act, 42 U.S.C. § 7413(e), the facts of this case, and other factors such as cooperation and prompt compliance, Complainant has determined that an appropriate civil penalty to settle this action is \$ 23,296.

37. Within 30 days after the effective date of this CAFO, Respondent must pay the \$ 23,296 civil penalty by sending a cashier's or certified check, by regular U.S. Postal Service mail, payable to the "Treasurer, United States of America," to:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

The check must note "Bayer CropScience" and the docket number of this CAFO.

38. A transmittal letter stating Respondent's name, complete address, and the case docket number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Attn: Regional Hearing Clerk, (E-19J)
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Monika Chrzaszcz (SC-5J)
Chemical Emergency Preparedness and Prevention Section
Superfund Division
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

William Wagner, (C-14J)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

39. This civil penalty is not deductible for federal tax purposes.
40. If Respondent does not timely pay the civil penalty, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and the United States' enforcement expenses for the collection action under Section 113(d)(5) of the Act, 42 U.S.C. § 7413(d)(5). The validity, amount, and appropriateness of the civil penalty are not reviewable in a collection action.
41. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any overdue amount from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a quarterly nonpayment penalty each quarter during which the assessed penalty is overdue according to section 113(d)(5) of the CAA, 42 U.S.C. § 7413(d)(5). This nonpayment penalty will be 10 percent of the aggregate amount of the outstanding penalties and nonpayment penalties accrued from the beginning of the quarter.

SUPPLEMENTAL ENVIRONMENTAL PROJECT

42. Respondent must complete a supplemental environmental project (SEP) designed to protect the environment and public health by providing the Muskegon Township Fire Department with necessary equipment to transport by trailer and have the ability to apply foam to suppress alcohol resistant chemical fires.

43. Respondent must implement the SEP as follows: within 30 days from the filing

of this CAFO, Respondent will cause a purchase order to be placed to the vendor, for delivery within 90 days to the Muskegon Township Fire Department, of the following: a Dual Foam Trailer, 530 gallons of Class B AR-AFF Foam, 660 gallons of training Foam, nozzles and adaptors, and hoses.

44. Respondent must spend at least \$63,630 in implementing the project described in the previous two paragraphs.

45. Respondent certifies that it is not required to perform or develop the SEP by any law, regulation, grant, order, or agreement, or as injunctive relief as of the date it signs this CAFO. Respondent further certifies that it has not received, and is not negotiating to receive, credit for the SEP in any other enforcement action.

46. U.S. EPA may inspect the facility at any time to monitor Respondent's compliance with this CAFO's SEP requirements.

47. Respondent must submit a SEP completion report to U.S. EPA within 30 days from the delivery of the purchased equipment, or within 150 days from the filing of this CAFO, whichever is sooner. This report must contain the following information:

- a. Detailed description of the SEP as completed;
- b. Description of any operating problems and the actions taken to correct the problems;
- c. Itemized costs of the equipment purchased for the Muskegon Township Fire Department;
- d. Certification that Respondent has completed the SEP in compliance with this CAFO; and
- e. Description of the environmental and public health benefits arising from the SEP (quantifying the benefits and pollution reductions, if feasible).

48. Respondent must submit all notices and reports required by this CAFO by first

class mail to Monika Chrzaszcz of the Chemical Emergency Preparedness and Prevention Section at the address specified in paragraph 38, above.

49. In each report that Respondent submits as provided by this CAFO, it must certify that the report is true and complete by including the following statement signed by one of its officers:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, it is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

50. Following receipt of the SEP completion report described in paragraph 47, above, U.S. EPA must notify Respondent in writing that:

- a. It has satisfactorily completed the SEP and the SEP report;
- b. There are deficiencies in the SEP as completed or in the SEP report and U.S. EPA will give Respondent 30 days to correct the deficiencies; or
- c. It has not satisfactorily completed the SEP or the SEP report and U.S. EPA will seek stipulated penalties under paragraph 52.

51. If U.S. EPA exercises option b, above, Respondent may object in writing to the deficiency notice within 10 days of receiving the notice. The parties will have 30 days from U.S. EPA's receipt of Respondent's objection to reach an agreement. If the parties cannot reach an agreement, U.S. EPA will give Respondent a written decision on its objection. Respondent will comply with any reasonable requirements U.S. EPA imposes in its decision. If Respondent does not complete the SEP as required by U.S. EPA's decision, Respondent will pay stipulated penalties to the United States under paragraph 52, below.

52. If Respondent violates any requirement of this CAFO relating to the SEP, Respondent must pay stipulated penalties to the United States as follows:

- a. Except as provided in subparagraph b, below, if Respondent did not complete the SEP satisfactorily according to the requirements of this CAFO, Respondent must pay a stipulated penalty of \$50,904.
- b. If Respondent did not complete the SEP satisfactorily, but U.S. EPA determines that Respondent made good faith and timely efforts to complete the SEP and certified, with supporting documents, that it spent at least 90 percent of the amount set forth in paragraph 44, Respondent will not be liable for any stipulated penalty under subparagraph a, above.
- c. If Respondent completed the SEP satisfactorily, but spent less than 90 percent of the amount set forth in paragraph 44, Respondent must pay a stipulated penalty of \$10,000.
- d. If Respondent did not submit timely the SEP completion report, Respondent must pay penalties as stipulated below for each day after the report was due until it submits the report:

<u>Penalty Per Violation Per Day</u>	<u>Period of Violation</u>
\$100	1 st through 14 th day
\$200	15 th through 30 th day
\$500	31 st day and forward

53. U.S. EPA's determinations of whether Respondent completed the SEP satisfactorily and whether Respondent made good faith and timely efforts to complete the SEP will bind Respondent.

54. Respondent must pay any assessed stipulated penalties within 15 days of receiving U.S. EPA's written demand for the penalties. Respondent will use the method of payment specified in paragraphs 36-41, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

55. Any public statement that Respondent makes referring to the SEP must include the following language, "Bayer CropScience, undertook this project in settlement of an enforcement action brought by the United States Environmental Protection Agency for violations of the emergency planning requirements of the Clean Air Act."

56. For federal income tax purposes, Respondent will neither capitalize into

inventory or basis, nor deduct the \$63,630 expenditure incurred in performing the SEP, and any amounts spent in excess of that will be handled in compliance with all applicable tax laws and regulations.

General Provisions

57. This CAFO resolves Respondent's liability only for federal civil penalties for the violations alleged in this CAFO.

58. The CAFO does not affect the right of U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

59. This CAFO does not affect Respondent's responsibility to comply with the Act and other applicable federal, state, and local laws. Except as provided in paragraph 57, above, compliance with this CAFO will not be a defense to any actions subsequently commenced pursuant to federal laws administered by Complainant.

60. Respondent certifies that to the best of its knowledge it is complying with 40 C.F.R. Part 68.

61. The terms of this CAFO bind Respondent, its successors, and assigns.

62. Each person signing this consent agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

63. Each party agrees to bear its own costs and attorneys' fees in this action.

64. This CAFO constitutes the entire agreement between the parties.

65. The effective date of this CAFO is the date when this CAFO is filed with the Regional Hearing Clerk's office.

CONSENT AGREEMENT AND FINAL ORDER

In the Matter of Bayer CropScience LP
Docket No.

Bayer CropScience LP, Respondent

Date: 3/19/2014

By: Harold Peltier

Its: Muskegon Site Manager

Bayer CropScience LP

United States Environmental Protection Agency, Complainant

Date: 3/28/2014


Richard C. Karl
Richard C. Karl, Director
Superfund Division

CONSENT AGREEMENT AND FINAL ORDER
In the Matter of Bayer CropScience LP
Docket No. **CAA-05-2014-0018**

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

4/3/14
Date



Susan Hedman
Regional Administrator
U.S. Environmental Protection Agency
Region 5




Certificate of Service

I hereby certify that I have caused a copy of the foregoing Consent Agreement and Final Order (CAFO) to be served upon the persons designated below, on the date below, by causing said copies to be delivered by depositing in the U.S. Mail, First Class, and certified-return receipt requested, postage prepaid, at Chicago, Illinois, in envelope addressed to:

Steven C. Kohl, Partner
Warner Norcross & Judd LLP
2000 Town Center, Suite 2700
Southfield, Michigan 48075-1318

I have further caused the original CAFO and this Certificate of Service, and one copy, to be filed with the Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, on the date below.

Dated this 8th day of April, 2014.


Jarrah P. Sanders
U.S. Environmental Protection Agency
Region 5

